DEFENDERS OF WILDLIFE ET AL.

IBLA 97-479 Decided June 5, 1998

Appeal from an order of Administrative Law Judge James H. Heffernan, dismissing an appeal of a Bureau of Land Management grazing bill. AZ-020-97-03080.

Affirmed as modified.

1. Appeals--Board of Land Appeals--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Standing to Appeal

The existence of a BLM decision, adverse to a party to a case, is necessary to provide jurisdiction for an appeal to the Board of Land Appeals. An appealable decision takes or prohibits some action. A billing notice for grazing privileges established by prior planning documents is not a final, appealable decision under 43 C.F.R. § 4160.3 or 43 C.F.R. § 4.470. An appeal of such a billing notice is properly dismissed.

APPEARANCES: David J. Armacost, Esq., Phoenix, Arizona, for Appellants; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Defenders of Wildlife, et al., (Appellants) 1/ have appealed from a June 6, 1997, Order by Administrative Law Judge (ALJ) James H. Heffernan dismissing their appeal of a BLM grazing bill (G02239420) issued to cover the South Vekol grazing Allotment (No. 3380), Phoenix Grazing District, Arizona.

Grazing bill G02239420 was issued to Lamco Livestock, Inc. and Kevin Lamb, Gilbert, Arizona. It had a due date of March 10, 1997, requested the remittance of $143, and covered the period March 1, 1997, through May 1, 1997. The bill, which is a form document, instructs the recipient to remit

1/ The other Appellants listed are: Sierra Club, Grand Canyon Chapter, Southwest Center for Biological Diversity, and Steve Johnson.

"the amount due in grazing fees for livestock grazing use offered to you." It appears that BLM issues such bills in conjunction with a "Grazing Application," which is also a form document. Generally, the grazing application describes the grazer's basic grazing schedule, summarizes his recognized grazing preference from his permit and allows him to request changes in his basic grazing schedules. See BLM's Apr. 22, 1997, Motion to Dismiss (hereinafter Motion) and Ex's. A and B to that Motion, filed with the Hearings Division.

Appellants had originally challenged BLM's issuance of an earlier grazing bill, G02239419, which covered the period March 1, 1997, through February 28, 1998. Appellants styled their challenge as a "Grazing Appeal of February 24, 1997, Decision to issue a grazing permit on the South Vekol Grazing Allotment No. 3080."

In its April 22, 1997, Motion, BLM explained that the original bill was cancelled and replaced with bill No. G02239420:

> The key difference between the two billings is that the first provided for 50 head of livestock, at 582 AUMs [animal unit months] active use (during a grazing season which started March 1, 1997 and extended through February 28, 1998) and the second provided 50 head at 99 AUMs through a considerably shortened grazing season extending from March 1, 1997 through and including May 1, 1997. Under the second and currently effective billing, Appellant [sic] has taken nonuse for 160 head at 1546 AUMs for a grazing season extending from May 2, 1997 through and including February 28, 1997. The grazing permittee requested these changes which, in BLM's view are within the scope of BLM's existing planning documents.

(Motion at 3-4.)

The BLM further explained that

> [a]s a perennial-ephemeral allotment, there is no grazing permit or grazing lease for the South Vekol allotment as those terms are defined by 43 C.F.R. 4100.0-5. Instead, to the extent there is grazing on the allotment, it is authorized on the basis of an annual grazing application and grazing billing. These documents collectively provide BLM's authorization to use the forage resources on the allotment under specified terms and conditions for the year authorized. Even though a permit or lease is not issued as such, all of the otherwise applicable grazing regulations at 43 C.F.R. 4100 apply.

(Motion at 4.)

"Ephemeral rangelands" are defined as "areas of the Hot Desert Biome (Region) that do not consistently produce enough forage to sustain a

livestock operation but may briefly produce unusual volumes of forage to accommodate livestock grazing." 43 C.F.R. § 4100.0-5.

The BLM asserted that "the 1997 grazing authorization and grazing billing for the South Vekol allotment" was not a new management practice, but had been in effect continuously since 1989. (Motion at 4.) The BLM cited the planning documents (Lower Gila South Resource Management Plan (RMP), Environmental Impact Statement, Phoenix District, Arizona Final, and the 1988 Record of Decision (ROD) for the Approval of the Lower Gila South RMP, among others) implementing grazing and related resource use on the South Vekol allotment and the Vekol Valley Grassland Area of Critical Environmental Concern. (Motion at 5; Ex's. E and F.)

Chapter 3 of the RMP discusses the live stock grazing specifications of the perennial-ephemeral allotments within the resource area against a background of rangeland vegetation and wildlife considerations. The ROD states that the "perennial-ephemeral allotments will be monitored to provide data for any needed adjustments." (ROD at 1; Motion, Ex. F.)

The Appellants contended before the ALJ that what they characterized as the 1997 renewal of the grazing authorization on the South Vekol Allotment constituted a final, appealable decision by an authorized BLM official under 43 C.F.R § 4.470 and Subpart 4160.4. Under 43 C.F.R. § 4.470, governing grazing procedures, a decision of a BLM officer must be appealed to an ALJ. The ALJ's decision may then be appealed to the Board. See 43 C.F.R. § 4.410. 43 C.F.R. § 4160.4 covers appeals in grazing administration cases. It provides that "[a]ny person whose interest is adversely affected by a final decision of the authorized officer may appeal the decision for the purpose of a hearing before an administrative law judge."

The ALJ rejected Appellants' argument, holding that in order to constitute an appealable decision and trigger jurisdiction of the Hearings Division under 43 C.F.R. § 4160.3, 2/ such decision would have to adjudicate "some material, substantive change, such as an increase in AUM's." (Dec. at 4.) The ALJ found, based on the record, that the grazing application and BLM billing contained no material changes from previously authorized use from 1988 through 1996. He found that the billing was a simple renewal of grazing privileges and "an extension of the status quo that had existed on this allotment all the way back to 1973." (Dec. at 5.)

Appellants also presented to the ALJ numerous specifications of error charging that BLM erred in issuing a "final decision" allowing

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2/ The regulatory scheme in grazing administration provides preliminarily for issuance of a "proposed decision" adjudicating "terms or conditions, or modifications relating to applications, permits and agreements * * *" (43 C.F.R. § 4160.1(a)), which will become a final decision in the absence of a protest by any "applicant, permittee, lessee or other interested public." 43 C.F.R. §§ 4160.2, 4160.3.

grazing in the South Vekol Allotment in disregard of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4332 (1994), the Federal Land Policy and Management Act, 43 U.S.C. § 1701 (1994), the grazing regulations (43 C.F.R. § 4100), the BLM Handbook and the Administrative Procedure Act, 5 U.S.C. § 500 (1994). Appellants contended that BLM had neglected to properly monitor the range and had thus failed to appreciate adverse effects on key plant species and conflicts between grazing and wildlife.

After summarizing these charges, the ALJ observed that

> the extensive documentation submitted by counsel for BLM does serve to rebut the allegations of error submitted by the Appellants. While a number of these allegations are peripheral to the instant jurisdictional issue, the facts established in the administrative record to date provide no basis for an appeal, even if BLM's extension of grazing privileges were to be construed as a final decision under 43 C.F.R. §§ 4160.3, 4160.4.

(Dec. at 4.)

The ALJ found that the grazing bill resulted in no "material change in the historically authorized grazing on this allotment * * * [and] constituted a mere extension of the status quo that had existed on this allotment all the way back to 1973." (Dec. at 4-5.) He found that Appellants' notice of appeal was untimely and that Appellants should have lodged their appeal earlier "following promulgation of the various documents which constitute the resource management plan for the South Vekol Allotment." (Dec. at 5.)

The ALJ then listed the various planning documents included in the record. He observed that those documents failed to support Appellants' contention that "simple extension of grazing privileges on an allotment was somehow not in compliance with the applicable resource management plan." He further found that BLM had conducted adequate monitoring of the range and that no conflicts between grazing and wildlife were established. (Dec. at 6.) He concluded: "The extensive evidence presented by the government to accompany its Motion demonstrates that the extension of grazing privileges which followed the grazing application and grazing billings, is permissible within the existing planning and management framework covering the South Vekol Allotment." (Dec. at 6-7.)

The ALJ then dismissed the appeal based on lack of subject matter jurisdiction under 43 C.F.R. § 4.470(d).

In their appeal to this Board, Appellants refer to 43 C.F.R. § 4.470(d), contending that none of the reasons listed in that provision for granting a motion to dismiss are operative in this case. The regulation at 43 C.F.R. § 4.470(d) provides that the State Director may file on behalf of the authorized officer a motion to dismiss for the reason that

the appeal is frivolous, was filed late, does not clearly state error, raises immaterial issues, raises issues which were included in prior final decisions which were not appealed or raises issues which were previously adjudicated in an appeal involving the same preference, the same parties or their predecessors in interest.

The Appellants allege that their appeal presents "factual disputes * * * such that a hearing must occur." (Statement of Reasons (SOR) at 8.) Appellants assert that the ALJ ruled upon factual issues, such as whether BLM properly monitored the range, and that he thus reached the merits without allowing Appellants to examine BLM officers in the setting of a hearing. (SOR at 10.)

The Appellants articulate, as follows, their reasons for appealing the BLM issuance of grazing bill G02239420. They state that "this year's decision * * * did not include terms and conditions responsive to other BLM decisions made in previous years regarding this allotment." Appellants assert that such decisions, made in previous years, covered monitoring and range management actions pertaining to Vekol Valley areas of critical environmental concern, Table Top Wilderness Area and other areas of the allotment, including Desert Tortoise habitat. Appellants state that these issues were not adjudicated in the various annual grazing bills between 1988 and 1996. (SOR at 11.)

The BLM responds that the grazing bill at issue presents no new management practices, that the grazing specifications for the South Vekol allotment were established in 1973, and that the ALJ correctly dismissed the appeal for lack of a final appealable decision. The BLM asserts that the appeal is subject to dismissal for the additional reason that Appellants lack standing.

The case file indicates that the determination to manage the South Vekol allotment as a perennial-ephemeral range is reflected in an October 31, 1975, agreement between the Lower Gila Resource Area Manager and the then-allottee. (BLM Motion, Ex. D.) In that agreement, the base herd qualification of 1,863 AUM's, the equivalent of 160 cows year-long, was established. That base herd qualification is carried forward in the billing notices from 1989 through 1997. (BLM Motion, Ex's. A, B, and C.)

The sole issue in this case is whether BLM's grazing bill G02239420 is a final decision subject to appeal. We hold that it is not and that the appeal was properly subject to dismissal for this reason. Although the ALJ dismissed the appeal for lack of subject matter jurisdiction, he examined and adjudicated substantive matters which were not placed before him by the appeal of the grazing bill. Though the ALJ erred in ruling on substantive issues not before him, he correctly dismissed the appeal.

The Appellants' argument that none of the grounds for dismissal listed in 43 C.F.R. § 4.470(d) is operative in this case is without merit. First, insofar as the appeal is a challenge to any of BLM's planning documents

(as Appellants assert it is (SOR at 11)), it is an untimely appeal and covered by the regulation. Secondly, even if it were not covered, nothing in 43 C.F.R. § 4.470(d) provides that it offers an exclusive listing of grounds for the dismissal of procedurally flawed appeals.

Though the ALJ ruled upon substantive issues, his rulings do not operate to cure the lack of subject matter jurisdiction, which is due to the absence of a final appealable decision. Without jurisdiction, no factual matters can be at issue and hence, no hearing is required.

[1] Departmental regulation 43 C.F.R. § 4.470(a) confers the right to appeal from "a decision of an officer of the Bureau of Land Management or of an administrative law judge." The requirement that there be "a decision of an officer" announcing or prohibiting a specific action before there can be an appeal is essential. The "decision" referred to by the regulation has been interpreted to mean that some action affecting individuals having interests in the public lands is either announced or prohibited. Joe Trow, 119 IBLA 388, 392 (1991). In this case, the grazing bill makes no determination regarding Appellants' individual rights on the public lands and neither takes nor prevents action. It does not establish, authorize, or in any way adjudicate grazing privileges, and it does not weigh grazing privileges vis-a-vis environmental concerns against a background of public land management and resource policies. For these reasons, it does not constitute a decision which is appealable to the Board. See Headwaters, Inc., 101 IBLA 234, 239 (1988).

In this case, Appellants seek, by challenging a grazing bill, to establish a forum for discussing various land use planning, resource and environmental issues which were fully evaluated with opportunity for public input, comment and contemporaneous right of appeal, years before issuance of the grazing bill. The BLM's evaluation and planning resulted in the preparation and issuance of BLM's RMP, ROD, and other documents, prescribing the management of the Lower Gila South Resource Management Area, including the Vekol Grazing District. The use specifications for that allotment were established by those planning processes, not by the grazing bill assessing a fee for its use. Appellants' challenge to the grazing bill is an untimely appeal of land use planning processes and decisions establishing the grazing use for which the bill was issued.

We conclude that the grazing bill did not constitute a decision adverse to Appellants and subject to appeal under 43 C.F.R. § 4.470(a). Joe Trow, supra, at 392; see Cities of Colorado Springs & Aurora, 77 IBLA 395, 397 (1983).

To the extent not discussed, Appellants' other arguments have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Order appealed from is affirmed to the extent it dismissed the appeal.

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James P. Terry
Administrative Judge

I concur:

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James L. Byrnes
Chief Administrative Judge